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IN THE

Supreme Court of the United States

OCTOBER TERM [redacted] 1961

No. 382

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA,
Appellees.

On Appeal From the District Court for the State of Alaska

BRIEF FOR APPELLANT

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METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation,
Appellant,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, and THE STATE OF ALASKA,
Appellees.

On Appeal From the District Court for the State of Alaska

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District Court for the State of Alaska (R. 59-66) is reported at 174 F. Supp. 500 (1959).

JURISDICTION

The judgment of the District Court was entered on July 2, 1959 (R. 69-70). The notice of appeal was filed on August 6, 1959 (R. 1-4). On December 7, 1959, this Court ordered:

> Further consideration of the question of jurisdiction is postponed to the hearing of the cases on the merits. (R. 76.)

The jurisdiction of this Court rests on 28 U.S.C. § 1257(1), (2).

QUESTIONS PRESENTED

1. Whether the jurisdiction of this Court over an appeal from the final judgment of the highest court of a State can be defeated by the creation of a still higher State court after the appeal to this Court has been perfected.

2. Whether the exclusive right granted appellant by the Act of March 3, 1891 to fish within its reservation subject only to Federal regulation was modified as a result of Alaska's elevation to statehood.

3. Whether Section 4 of the Alaska Statehood Act, which preserves Indian fishing rights in Alaska under the "absolute jurisdiction and control" of the United States, is unconstitutional.

STATUTES INVOLVED

1. Section 4, Alaska Statehood Act, 72 Stat. 339 (1958):

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or

other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe. . . .

2. Section 15, Act of March 3, 1891, 26 Stat. 1101, 48 U. S. C. § 358:

Annette Islands reserved for Metlakahtla Indians.

Until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in southeastern Alaska on the north side of Dixon's entrance, is set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who, on March 3, 1891, had recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

3. Presidential Proclamation No. 1332, April 28, 1916, 39 Stat. 1777:

. . .

WHEREAS the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

WHEREAS it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery,

Now, therefore, I, WOODROW WILSON, President of the United States of America, by virtue of the power in me vested by the laws of the United States, do hereby make known and proclaim that the waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island, and adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

4. Constitution of the State of Alaska:

(a) Article XII, Section 12:

The State of Alaska and its people forever disclaim all right and title in or to any property belonging to the United States, or subject to its disposition and not granted or confirmed to the State or its political subdivisions, by or under the act

admitting Alaska to the Union. The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

(b) Article XV, Section 17:

Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law.

5. Chapter 95, Session Laws of Alaska, April 17, 1959:

Section 1. It shall be unlawful to operate fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, in the State of Alaska on or over any of its lands, tidelands, submerged lands, or waters; . . . nor shall this Act be construed so as to violate Sec. 4 of Public Law 85-508, 72 Stat. 339, which constitutes a compact between the United States and Alaska, pursuant to which the State disclaims all right and title to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called Natives) or is held by the United States in trust for said Natives.

Sec. 2. Section 1 of Chapter 17, SLA 1959, is hereby amended to read as follows:

Section 1. It shall be unlawful to erect, moor, or maintain fish traps, including but not limited to floating, pile-driven or hand-driven fish traps, on or over any lands, tidelands, submerged lands or

waters owned or hereafter acquired by the State of Alaska. . . .

. . .

Sec. 5. A violation of this Act shall be a misdemeanor and shall be punishable by imprisonment not to exceed one year, or by a fine not to exceed $5,000.00, or by both such imprisonment and fine.

STATEMENT OF THE CASE

This suit arose out of an attempt by the newly-created State of Alaska to regulate the fishing rights of appellant, Metlakatla Indian Community, a Federally-chartered corporation located at the Annette Island Reserve in Southeastern Alaska. Specifically, appellant sued in the District Court for the State of Alaska to enjoin State officials from attempting by force of State criminal laws to prohibit appellant from exercising within an area set apart by Congress for its exclusive use its right to catch salmon by means of fish traps, in accordance with regulations promulgated by the Secretary of the United States Department of the Interior.

By Section 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U. S. C. § 358, Congress established a reservation encompassing all of the Annette Islands in Alaska—including the waters surrounding those Islands—for the use and benefit of the Metlakatla Indians. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918); *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 112-114 (1949). The Metlakatla Indian Community has at all times depended on fishing as the source of its economic support (R. 11). As this Court once had occasion to observe, it was their attractiveness for fishing purposes which caused the Metlakatlans to select the Annette Islands for a reservation. *Alaska*

Pacific Fisheries v. *United States, supra,* 248 U.S. at 88-89. In 1916 the exclusive fishery area granted by Congress in 1891 was defined by Presidential Proclamation No. 1332 as extending 3,000 feet from the shoreline at mean low tide. 39 Stat. 1777 (1916).

The 1891 statute and the 1916 Proclamation made explicit that appellant's right to use the resources of the Annette Islands was subject to Federal regulation and limitation. Federal regulations as to fishing by the Metlakatlans have been in effect for over forty years and continue to be in effect today (R. 6, 9-10, Appendix C, *infra* at 51). The validity of those regulations had not been disputed prior to Alaska's admission to statehood.

It was as a result of Alaska's admission to statehood that this controversy arose. Both Section 4 of the Alaska Statehood Act and Article XII of the Alaska Constitution provide specifically that Indian fishing rights "remain under the absolute jurisdiction and control of the United States." Acting pursuant to Section 4, the Secretary of the Interior, on March 7, 1959, issued regulations which allowed the operation of four fish traps by the Metlakatla Indian Community. 24 Fed. Reg. 2053, 2069 (1959).

The State of Alaska nevertheless asserted the power to superimpose its regulations on the Federal regulations by declaring the Metlakatlan fish traps illegal. Having enacted an anti-fish trap law, Ch. 95, Session Laws of Alaska 1959, the State asserted that this law applied to fishing by the Metlakatlans within their exclusive reservation, and threatened to imprison members of the Community responsible for the maintenance of the traps (R. 13, 40). To enjoin the threatened invasion of its rights on the reservation, the Metlakatla

Indian Community filed this suit. After an adverse judgment by the District Court for the State of Alaska, this appeal was taken.

On July 11, 1959 Mr. Justice Brennan entered a stay which permitted appellant to fish during the 1959 season and thereafter

> pending . . . disposition by this Court of said petitions . . . as [appellants] have been authorized by the Secretary of the Interior of the United States pursuant to his Regulation of March 7, 1959, 24 Fed. Reg. 2053, or as [appellants] may from time to time be authorized by him.

On April 6, 1960, the Secretary of the Interior continued to assert Federal jurisdiction over fishing by the Metlakatlans by issuing proposed regulations governing the future use of fish traps by appellant. 25 C.F.R. Pt. 88, 25 Fed. Reg. ..... (1960).

SUMMARY OF ARGUMENT

I.

A. This case is before this Court on appeal from a final judgment of the highest court of Alaska in which a decision could be had. The court below—formerly a territorial court—functioned after statehood as a State court. It was the only existing State court—and therefore the highest State court—at the time judgment was rendered and the notice of appeal was filed. Subsequent constitution of a State appellate court in Alaska did not oust this Court of its already perfected appellate jurisdiction.

B. The decision below drew into question the validity of Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), and the decision was against the validity of

that Section. There was also drawn into question below the validity of a criminal statute of Alaska as applied to appellant—on the grounds of its repugnance to Section 4—and the lower court upheld the State statute as overriding the plain language of an Act of Congress. Appellate jurisdiction therefore lies under both 28 U.S.C. § 1257(1) and 28 U.S.C. § 1257(2).

II.

Under Section 15 of the Act of March 3, 1891 appellant was granted the exclusive right to fish in the waters immediately surrounding the Annette Islands, subject only to Federal regulation. There is apparently no dispute that this state of affairs continued until January 3, 1959.

On January 3, 1959 Alaska was admitted to the Union under the provisions of the Alaska Statehood Act, 72 Stat. 339 (1958), Section 4 of which reserved to the United States continued "absolute jurisdiction and control" over Indian fishing rights in Alaska. Mere examination of the language of Section 4 as well as a study of its legislative history makes clear that it was the intent of Congress to continue the arm of Federal protection over the rights of the Indian communities of Alaska and to prevent the State from interfering with these rights in any way.

In its opinion the court below did not even refer to Section 4 of the Alaska Statehood Act. Nor did appellees attempt to explain it away in their brief in the trial court. The fact that Congress intended to exclude the State from control of Indian fisheries and that it carried out its intention by enacting Section 4 of the Alaska Statehood Act seems to have been conceded.

III.

The thrust of the opinion of the court below seems to be that Congress lacked the power to prevent the State from regulating Indian fisheries. What the court appears to have held is that any attempt to restrict the authority of the State over Indian fisheries violates the doctrine that all States are admitted to the Union "on an equal footing" and is, therefore, unconstitutional.

The court below erred in holding unconstitutional Section 4 of the Alaska Statehood Act. The "equal footing" doctrine prevents the United States from using a Statehood Act as a means of limiting State jurisdiction or extending Federal jurisdiction only in a field in which the Constitution of the United States has not given the Federal Government authority to act. But in dealing with Indian communities, the Constitution grants to Congress, under the "Indian Commerce Clause," Article I, Section 8, Clause 3, "[p]lenary" power to act. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903). Nor has Alaska been singled out for discriminatory treatment. Clauses similar to Section 4 of the Alaska Statehood Act are contained in the Statehood Acts of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington. Moreover, this Court has found State jurisdiction not to apply on Indian reservations even in the absence of a specific disclaimer clause. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).[1] Congress thus clearly had the power to enact Section 4 of the Alaska Statehood Act.

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[1] In *Williams* v. *Lee*, 358 U.S. 217 (1959), this Court decided against State jurisdiction on the authority of *Worcester* v. *Georgia*, *supra*, relegating the disclaimer clause to a mere footnote. *Id.* at 222, n. 10.

ARGUMENT

The history and development of the Metlakatla Indian Community are living proof of how an enterprising people, aided by enlightened Federal policy, can establish a civilized community in a wilderness area, and can progress and prosper. After the Metlakatlans had been invited by the United States to settle in Alaska, they specifically selected the Annette Islands because of their fishing potential. Congress then reserved the area for their benefit.

Always an industrious people, they quickly established a thriving community. Federal protection made it possible for them to obtain substantial economic benefits from their exclusive fishery. Federal loans enabled them to develop their economic potential further and to raise their standard of living. A cannery was established, boats were purchased and, with the help of the Rural Electrification Administration, electricity was brought to the Islands. Profits derived by the community from the operation of its enterprises have been used for general community improvement, including the establishment and maintenance of a health clinic and the development of an adequate water supply and of sanitation facilities.

Having fostered this development of the Metlakatla Indian Community, the Federal Government did not wish, upon the admission of Alaska to statehood, to remove its protective arm. Congress explicitly asserted continued exclusive Federal authority over Indian fishing in Alaska. The basic question in this case is whether Congress had the power to do so. Appellant submits that it did.

I. JURISDICTION

A. The Judgment Below Was Rendered by the Highest Court of the State

Immediately prior to the admission of Alaska to the Union on January 3, 1959, the judicial authority over Alaska was vested in a territorial, legislative court, established by Congress, 48 U.S.C. § 101, pursuant to Article IV, Section 3, paragraph 2 of the United States Constitution. The draftsmen of the new Alaska State Constitution and of the Alaska Statehood Act recognized that on the date of admission there would be no distinct State juridical system in existence. See, *e.g.*, S. Rep. No. 1163, 85th Cong., 1st Sess. 28 (1957). Therefore, both the State Constitution, in Article XV, Sections 4 and 17, and Section 18 of the Alaska Statehood Act provided that the territorial court was to continue to function as before statehood during the interim between the effective date of the Statehood Act and the establishment by the Alaska legislature of the State judicial machinery. The personnel of the old territorial court remained on duty during the interim period. It was during this interim period that this action was instituted and decided below. Further, it was during this interim period that the appeal to this Court was perfected.

On the same day that the opinion below was announced in open court, July 1, 1959, appellant gave oral notice of its intention to appeal (R. 58). On July 11, 1959, on appellant's application, Mr. Justice Brennan granted a stay *pendente lite*. 4 L. Ed. 2d 34 (1959). On August 6, 1959 appellant filed a written notice of appeal to this Court (Tr. 5), and on August 20, 1959, filed its jurisdictional statement.

In analyzing the jurisdiction of the Supreme Court of the United States over this appeal, it is necessary first to determine the character of the court below: Was the lower court a Federal court or a State court?

That the interim court was a State court is not seriously challenged. The court below correctly so held (R. 55), and that holding is in accord with the rationale of *Benner* v. *Porter,* 50 U.S. (9 How.) 235, 242-45 (1850), and subsequent State and Federal cases. See *Ames* v. *Colorado Central Ry.,* 1 Fed. Cas. 750 (No. 324) (C.C.D. Colo. 1876); *Kansas* ex rel. *Hunt* v. *Meadows,* 1 Kan. 90 (1862); *Inerarity* v. *Curtis,* 4 Fla. 175, 179-180 (1851).

It is clear that the interim court was not, after January 3, 1959, a United States District Court. As was observed in *Parker* v. *McCarrey,* 268 F.2d 907, 909 (9th Cir. 1959), no one could reasonably contend that the lower court was the *new* United States District Court for the District of Alaska. That new District Court, provided for in Sections 12-18 of the Alaska Statehood Act, did not come into existence until February 20, 1960, when the President issued Executive Order No. 10867, 25 Fed. Reg. 1584 (1960), under Section 18 of the Statehood Act.

Nor was the court below a territorial court. As this Court held in the leading case of *Benner* v. *Porter, supra,* the admission of a State automatically and instantaneously terminates all aspects of its previous territorial government, including the territorial judicial system. See also *Forsythe* v. *United States,* 50 U.S. (9 How.) 571, 576 (1850); *McNulty* v. *Batty,* 51 U.S. (10 How.) 72, 77-78 (1851).

Granting that the court below was a State court, we now reach the question whether the judgment below was the final judgment of the highest court of Alaska in which a decision could be had, as is required for review by this Court. 28 U.S.C. § 1257.

It is uncontested that the judgment below, dismissing the complaint with prejudice (R. 70), is a final judgment. The issue now, however, is whether the judgment below is the judgment of "the highest court of a State in which a decision could be had." *Ibid.* More specifically, the issue raised by appellees is: At what point in time must the court below be the highest court?

This is admittedly an issue of first impression. Appellant has been unable to find any precedents squarely in point. The question must thus be decided through close examination of the wording of Section 1257 and by analyzing it in its setting, namely the role of this Court in the administration of justice. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 542-44 (1940). It is respectfully submitted that proper analysis of the wording of Section 1257 and its setting leads to the conclusion that the critical point in time is the date of the judgment.

The relevant text of Section 1257 reads as follows:

> Final judgments . . . rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court . . . .

The juxtaposition of the words "judgment" and "rendered" is significant. It is the "judgment" that must be scrutinized to determine its reviewability. In scrutinizing it, the circumstances under which it was "rendered" must be determined. If it is necessary to determine the circumstances under which a judgment is

"rendered," such determination must be made as of a specific point in time.

A judgment is, of course, "rendered" as of a day certain. If the court rendering the judgment is on such day certain the highest court of a State, then any judgment rendered by it on that day is the judgment rendered by the highest court. Section 1257 does not go on to say that such judgments may be reviewed only if at the time of review the court below is still the highest court.

A case which bears some relation to this question is *Market Street Ry.* v. *Railroad Comm'n of Calif.*, 324 U.S. 548 (1945). There this Court held that a judgment is "final" for purposes of 28 U.S.C. § 1257 "when the issues are adjudged" even though there is "a latent power in the rendering court to reopen or revise its judgment." 324 U.S. at 551. If this latent power can neither disturb the finality of a judgment, nor toll the time to seek review, an appeal to this Court should certainly not be defeated by the creation of a new court after the time for review has started to run.

The practical need for the rule suggested is demonstrated by the facts of this case. The judgment below was rendered on July 2, 1959, and the need for an appellate forum arose at once. Under this Court's rules, in order to seek a stay here appellant was first required to seek a stay in the trial court. See Rules 18(2), 51(2). It did so, and its petition was denied (R. 67). Appellant immediately thereafter sought a stay from this Court, since there was no further judicial authority in Alaska from which a stay could be sought. A stay was granted here by Mr. Justice Brennan on July 11, 1959.

As already indicated, analysis of the wording of Section 1257 results in the conclusion that it is the date of judgment which must be the date as of which the lower court must be the highest court of the State. However, if there were any doubt on this point, there can be only one other critical date: the date of filing of the notice of appeal. It is as of that date that the jurisdiction of this Court is invoked and vests. 28 U.S.C. § 2101; Rule 10(1) of the Rules of this Court. It is self-evident that havoc would be wreaked with our judicial system and, in particular, with the authority of this Court, if the jurisdiction of the Supreme Court of the United States, once having vested, could be defeated through manipulation by a State with either the finality of a judgment or the status of the court below as the highest court in which a decision could be had.

What was said in *Kentucky* v. *Powers*, 201 U.S. 1 (1906), with regard to this Court's power to review inferior State court decisions, applies equally to the principle that the standards of 28 U.S.C. § 1257 cannot remain in limbo but must become fixed as of a day certain:

> This must be so, else it will be in the power of a state to so regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution, and improperly denied in a subordinate state court, although specially set up and claimed. 201 U.S. at 37.

In the light of the foregoing analysis of the underlying legal considerations, the following facts are relevant:

1) Article XV, Section 17 of the Constitution of the State of Alaska provides that "[*u*]*ntil the courts pro-*

vided for in Article IV are organized . . . the judicial system shall remain as constituted on the date of admission." (Emphasis added.) See also Section 18, Alaska Statehood Act, 72 Stat. 350 (1958).

2) On July 2, 1959, the date of the judgment below, the only court organized and existing in Alaska was the trial court.

3) On July 11, 1959, Mr. Justice Brennan, in issuing his opinion on the application for a restraining order, observed:

> There is at present no higher court of the State to which petitioners can appeal. . . . 4 L. Ed. 2d at 36.

4) On July 29, 1959, the three justices of the Supreme Court of Alaska were appointed.

5) On August 6, 1959, appellant filed its Notice of Appeal (Tr. 5; R. 1-4).

6) On August 7, 1959, Chief Justice Nesbett and Justice Dimond took their oaths of office. Justice Hodge took his oath of office on September 1, 1959.

7) On September 25, 1959, the Supreme Court of Alaska appointed a clerk and promulgated rules.

8) On October 5, 1959, the Rules of the Supreme Court of Alaska became effective. See Alaska Supreme Court Rule 53.

The specific question to be answered on this state of facts is: When was the Supreme Court of Alaska "organized" so as to displace the interim judicial system? Some relevant comments in leading State cases throw light on this subject. Thus, in *State* v. *Sammons,* 223 Ind. 57, 57 N.E.2d 587 (1944), the Indiana Supreme Court declared:

> A time when, a place where, and the persons by whom, judicial functions are to be exercised, are essential to complete the idea of a court. 57 N.E. 2d at 590.

And in *Thompson* v. *Commonwealth,* 266 Ky. 529, 99 S.W. 2d 705 (1936), the court observed:

> To constitute a lawful court . . . the persons who assume to hold such court and dispense justice must be officially assembled under authority of law and the court must be held at the appropriate time and place approved by law therefor. 99 S.W. 2d at 706.

Article XII, Section 5 of the Constitution of Alaska provides: "All public officers, before entering upon the duties of their offices," shall take an oath of office. Article IV, Section 2 provides that the Alaska Supreme Court "shall consist of three justices." None of these three justices had entered upon his duties by August 6, 1959, when the Notice of Appeal was filed. It was not until September 1, 1959 that all members of the court had qualified.

Moreover, neither the Alaska Constitution nor any statute provided for any time or meeting place of the Supreme Court of Alaska. Article IV, Section 15 of the State Constitution, however, authorized the Supreme Court to make rules governing the administration of the courts. It was Rule 2 of the Rules of the Alaska Supreme Court which first specified the "time when" and the "place where" that court would meet. And it was Rules 7 and 54 which first provided for appeals from the District Court for the State of Alaska.

It is thus respectfully submitted that it was not earlier than September 25, 1959 and more likely on October 5, 1959 that the Supreme Court of Alaska was

"organized" within the meaning of Article XV, Section 17 of the Alaska Constitution. As the critical date for determining the status of the court below is July 2, 1959 and certainly not later than August 6, 1959, it follows that on the critical date the trial court was the highest court of the State in which a decision could be had.

B. The Judgment Below Was Based on a Decision Against the Validity of a Federal Statute and in Favor of the Validity of a State Statute

To complete consideration of the requirements of Section 1257 it must be shown that a Federal statute was drawn in question and that the decision was against its validity. Appellant based its claim on Section 4 of the Alaska Statehood Act (R. 14); the court below in effect declared that section unconstitutional as violative of the "equal footing" doctrine.

In addition, the lower court also upheld application to appellant of criminal laws of Alaska which appellant contended (R. 12, 15) were, under the terms of Section 4 of the Alaska Statehood Act, invalid as applied. Thus, the criminal laws of Alaska, over a challenge of repugnancy to a statute of the United States, were held valid. See 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 287-89 (1921).

All elements are present to establish this Court's jurisdiction under Section 1257.

C. Equity Jurisdiction Will Lie to Restrain the Enforcement of the Alaska Anti-Fish Trap Laws Against Appellant

Chapter 17, SLA 1959, as amended, a statute of the State of Alaska, provides that it shall be unlawful "to erect, moor, or maintain fish traps" and makes any

violation "punishable by imprisonment not to exceed one year or by fine not to exceed $5,000.00 or by both such imprisonment and fine." To restrain the enforcement of this criminal statute against itself and its members, appellant brought this action.

The court below rendered its judgment on the merits. The question of equity jurisdiction of that court was raised by appellees (Tr. 171-72) but the court, in proceeding to the merits, evidently decided in favor of its jurisdiction. In doing so, it was on sound legal ground.

As recently as 1949, this Court restated both the applicable legal principles and their specific application to the salmon fishing industry in Alaska. In language as apt in this case as it was there the Court stated:

> If respondents show that they are without an adequate remedy at law and will suffer irreparable injury unless the enforcement of the alleged invalid regulation is restrained, a court of equity will enjoin. While ordinarily criminal prosecutions will not be restrained even under an invalid statute, a civil action will lie in exceptional circumstances that make an injunction necessary to effectually protect property rights.
>
> The facts heretofore detailed as to the investments of respondents in canneries and fishing equipment and their established activities in the waters of the reservation make clear the serious effect on them of exclusion from the reservation. . . . [R]espondents could not operate profitably if prohibited from fishing in the reservation area. Many fishermen may stay away from the grounds for fear of punishment. . . . These [criminal] sanctions deny to respondents an adequate remedy at law. . . . [T]o stay out of the reservation prevents the profitable operation of the canneries. In

> such a situation a majority of this Court thinks that the "danger of irreparable loss is both great and immediate" and properly calls forth the jurisdiction of the court of equity. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, at 98-100 (1949).

This Court also noted that: "Seizure of a fisherman's boat is a drastic sanction." *Id.* at 100, n.16. Surely seizure of a fisherman's trap is no less drastic. See also *Toomer* v. *Witsell*, 334 U.S. 385, 391-92 (1948); *Truax* v. *Raich*, 239 U.S. 33, 38 (1915); *Pacific American Fisheries* v. *Mullaney*, 191 F.2d 137, 141 (9th Cir. 1951).

The evidence in the complaint and affidavits detailing the substantial loss to appellant if trap fishing were outlawed is impressive. The evidence shows clearly that if appellant is deprived of its trap-caught fish, it will become bankrupt and the entire Community will become economically dormant.

The Community-owned cannery's financial statements (R. 17-29) demonstrate that, after elimination of items attributable to fish trap operations:

1) A 1958 net profit of $253,106.38 would have been converted into a net loss of $65,279.88, or an effective total loss to the Metlakatla Community of $318,386.26.

2) Over the seven-year period 1952-1958 an average net profit of $86,148.51 would have been converted into an average net loss of $61,726.04, or an effective average annual loss to appellant of $147,874.55.

In addition, the Community is dependent upon cannery operations as the only source of income from which it can repay the following debts:

1) $1,578,781.59 to the Rural Electrification Administration, carrying annual installments of about $60,000 (R. 31).

2) $210,000 to the Bureau of Indian Affairs, carrying annual installments of $25,000 (R. 31).

Henry S. Littlefield, the elected Mayor of the Metlakatla Indian Community, summarized the plight of appellant in the following language:

> That the economic welfare and prosperity of the community is entirely dependent upon the successful operation of its salmon cannery; that without the use of its fish traps the cannery cannot be operated profitably; that the community has incurred an indebtedness to the United States in approximately the sum of two million dollars; that such indebtedness consists of loans for the construction and operation of a hydro-electric system and boat loans for the members of the reservation; that in order to secure said loans it was necessary to assure the federal government that the loans could be repaid from the operation of its salmon cannery; that the profits from the said cannery have been pledged to the United States as security for the payment of said loans; that without the operation of said fish traps the loans cannot be repaid which will result in economic disaster to the inhabitants and a loss to the federal government. (R. 37.)

A member of the Tribal Council put the problem in these words:

> Without the operation of these traps, our primary source of income, the life blood of our community will stop flowing. It would become, literally, a community ghost town. Without traps, we would become absolutely dependent as a community and as individuals upon the State of Alaska, or the United States of America. Most of our people

would go on welfare, and we would become wards of the government in the literal sense of the word.

We usually have about twenty men engaged in pre-season work on traps alone with an average annual payroll of approximately $30,000.00. The payroll for pre-season work done on the cannery proper amounts to approximately another $30,000.00 annually. The labor performed in the cannery by residents of our community, during the actual season itself, is in excess of $100,000.00. Most of this money is made by female members of the community, and it goes toward the acquisition of clothing and food, etc., for the winter months. If these people did not have a chance to make these wages in the cannery, it is safe to state that there is no place else that they could make it.

From my many years of experience with town affairs and from my intimate knowledge of the cannery operation, I can safely state that without the trap-caught production, we would be forced to curtail the cannery operation in its entirety. Without the operation of the cannery, and the wealth it creates for our community, our people would seriously suffer, to such an extent that we would be little more than an isolated native village, living on a dole, and without hope for the future. Our present achievements and desirable standard of living would go by the board and our model community, as it exists today, would be a thing of the past. (R. 32.)

It is respectfully submitted that from the foregoing evidence it must be concluded that the " 'danger of irreparable harm is both great and immediate' and properly calls forth the jurisdiction of the court of equity." *Hynes* v. *Grimes Packing Co., supra,* 337 U.S. at 100. As Mr. Justice Brennan put it in the opinion granting the stay:

I think the equities so plainly support the petitioners' application that it should be granted. The restraining order is sought by the petitioners upon allegations that the State of Alaska and its Governor, unless restrained, will treat the authorization by the Secretary of Interior of trap fishing by the petitioners as a nullity and enforce the State's criminal statute to prevent the petitioners' use of the authorized traps, resulting in substantial financial loss for 1959 fishing and cannery operations, and in turn causing irreparable injury to the economy and welfare of the Indian communities. . . . [T]he State and the Governor have made no showing which persuades me that the consequences feared by petitioners will not follow from enforcement of the state statute against the petitioners. The Solicitor General advised that it is the opinion of the Interior Department that the petitioners will be injured by its enforcement against them. And, whereas petitioners will suffer substantial and irreparable injury affecting three entire Indian communities if they are not permitted to engage in trap fishing as authorized by the Secretary for the current fishing season, for all that appears the injury to the State from a temporary restraining order will be slight, or at most will be of insufficient consequence to justify denying the petitioners a restraint against enforcement of a statute as to which there are serious doubts whether it may be validly applied to the petitioners. 4 L. Ed. 2d at 40.

II. THE MERITS

A. Under Section 15 of the Act of March 3, 1891 Appellant Was Granted the Exclusive Right to Fish in the Waters of the Annette Islands, Subject Only to Federal Regulation

The rights which appellant here seeks to protect are derived from Section 15 of the Act of March 3, 1891, 26 Stat. 1101, 48 U.S.C. § 358, which provides:

> Until otherwise provided by law the body of lands known as Annette Islands . . . is set apart as a reservation for the use of the Metlakahtla Indians . . . to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.

The foregoing statutory language has been construed by this Court as giving to appellant an exclusive right not only to the upland of the Annette Islands but to the adjacent waters and submerged land as well. In *Alaska Pacific Fisheries* v. *United States, supra,* this Court declared in a unanimous opinion by Mr. Justice Van Devanter:

> The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. . . . Evidently Congress intended to conform its action to their situation and needs. It did not reserve merely the site of their village, or the island on which they were dwelling, but the whole of what is known as Annette Islands, and referred to it as a single body of lands. This, as we think, shows that the geographical name was used, as is sometimes done, in a sense embracing the intervening and surrounding waters as well as the upland,—in other words, as descriptive of the area comprising the islands. *Id.* at 89.

On the basis of this conclusion, the Court granted an injunction compelling Alaska Pacific Fisheries to withdraw from the waters of the Annette Islands.

While the Court found sufficient authority in the 1891 Act to declare the waters surrounding the Annette Islands to be part of the reservation—and therefore that the United States could secure to the Metlakatlans the exclusive fishing right in reservation waters—the Executive Branch had nonetheless moved to provide an exact definition of the geographic boundaries of the reservation area contained in the 1891 statutory grant. On April 28, 1916, President Wilson had issued a proclamation which declared that:

> [T]he waters within three thousand feet from the shore lines at mean low tide of Annette Island, Ham Island, Walker Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets . . . also the bays of said islands, rocks, and islets, are hereby reserved for the benefit of the Metlakatlans . . . to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce. 39 Stat. 1777.

In *Hynes* v. *Grimes Packing Co., supra,* this Court acknowledged the vitality of the *Alaska Pacific* holding that the Indians' statutory reservation extended to the offshore waters as well as to the upland. In discussing the relation of President Wilson's 1916 Proclamation and the 1891 Act, as set forth in the *Alaska Pacific* case, this Court stated in *Hynes* v. *Grimes Packing Co., supra,* 337 U.S. at 113-114:

> This Court affirmed the decree as to the waters within 3,000 feet of the shore lines. Although in the brief a vigorous attack was made on the power to issue the proclamation covering the waters, the proclamation was not referred to in the unanimous opinion here. *This Court felt compelled to decide the fisheries were included in the language of the*

> *statute* by the purpose to assist the Indians to train themselves. Fishing was said to give value to the islands. "The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location." *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89. (Emphasis added.)

Thus, as late as 1949, this Court had confirmed appellant's right to exclusive use of the Annette Islands and their adjacent waters, subject to regulation only by the United States. As we shall show, that right has never been abrogated or curtailed by any action of the Congress of the United States. The exclusive power to regulate fishing in those waters has never been surrendered by the Federal Government. And the Alaska Statehood Act specifically reserved to the United States the "absolute jurisdiction and control" of appellant's fishing rights. In addition, the Executive Branch has in the past[2] and continues in the present[3] to assert Federal jurisdiction over the waters of the Annette Islands.

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[2] Article I of the Constitution of the Metlakatla Indian Community, approved by Assistant Secretary of the Interior Oscar L. Chapman on August 23, 1944, pursuant to the Act of May 1, 1936, 49 Stat. 1250, 25 U.S.C. § 473a, reaffirmed the Community's rights:

> The Metlakatla Indian Community shall for all purposes of this Constitution exercise jurisdiction over all the territory and waters described in the aforesaid Act of March 3, 1891, and the Presidential Proclamation of April 28, 1916, and such other lands and waters as may in the future be acquired by or reserved for the Community.

[3] See Letter from Under Secretary of the Interior Elmer F. Bennett to Alaska Area Director, Bureau of Indian Affairs, dated March 10, 1959, where Mr. Bennett, after referring to Alaska's disclaimer in Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958), stated:

> This disclaimer, coupled with the longstanding supervisory control exercised for the protection of the interests of Indians,

B. The Rights Granted Appellant Under the Act of March 3, 1891 Were Explicitly Preserved by Section 4 of the Alaska Statehood Act

(1) *Section 4 of the Alaska Statehood Act was designed to protect appellant's rights.*

As indicated by the foregoing, the right to hold and use the Annette Islands was granted to the Metlakatlans, subject only to the power of the United States to regulate and restrict that right. This power to regulate and restrict has indeed been exercised by the United States in the field of immediate concern in this law suit, that of fishing. For many decades, the United States has in the interest of conservation, imposed limitations on the free exercise of the Metlakatla Indian Community of its right to fish. However, until 1959 it had not been disputed that, to the extent to which the Federal Government authorized fishing by the Metlakatlans within their reservation, such fishing was legal and not subject to any other restrictions.

Proceeding on the assumption that the legal rights and relationships as established by the Act of March 3, 1891 had not been altered by any subsequent legislation, see note 3, *supra,* the Secretary of the Interior in 1959 promulgated Alaska fishing regulations which permitted, *inter alia,* the operation of four fish traps within the Metlakatla Reservation during the 1959 fishing season. 24 Fed. Reg. 2053 (1959). The Secretary has announced that he intends to do the same with regard to the 1960 season and thereafter. See Appendix C, *infra* at 51.

Eskimos and Aleuts by the Department of the Interior, accounts for the provision that the proposed regulations will not eliminate operation of the fish traps by Indian tribes or villages. *The Secretary will continue to control the operation of traps by Indian tribes and villages.* (R. 18.) (Emphasis added.)

Against this action of the Secretary of the Interior in 1959 and the proposed action in 1960, the State of Alaska asserts the power to prohibit what the Secretary has permitted and what the United States has supported with financial and technical aid (R. 31, 34, 37). Having outlawed fish traps elsewhere in the State, the State contends that it may do the same on the Metlakatla Reservation and that the 1959 regulations (and presumably the 1960 regulations as well) of the Secretary of the Interior permitting the operation of four traps are null and void (R. 40).

While the decision below, having been announced from the bench because of the urgency of the matter, is not wholly clear in its analysis of the legal issues, it is evident that the court below felt that admission to Statehood clothed Alaska with the power to regulate fishing on the Metlakatla Reservation. The lower court seems to have decided that the Statehood Act, by implication, repealed the Act of March 3, 1891, under which appellant obtained a use right subject only to Federal regulation.

It is an established canon of statutory construction that an earlier specific statute shall not be construed as having been repealed by implication by a later general statute. Ex parte *Crow Dog,* 109 U.S. 556, 570-71 (1883). Thus, even if there had been no reference at all to Indian fishing rights in the Statehood Act, the Act of March 3, 1891 would have to be construed as continuing to accord exclusive regulatory power on the Metlakatla Reservation to the Federal Government.

But the fact is that Indian rights, including fishing rights, were most carefully considered in the drafting of the Statehood Act. Those fishing rights were specifically preserved as subject to the "absolute jurisdic-

tion and control" of the United States, until such jurisdiction is explicitly surrendered by Congress. Section 4 of the Alaska Statehood Act, 72 Stat. 339 (1958) provides:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title . . . to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property, belonging to the United States or which may belong to said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe . . . .

The new State's consent to this compact appears in Article XII, Section 12 of its Constitution.[4] That Section, which is virtually identical to the disclaimer language in Section 4 of the Statehood Act, recites:

> The State and its people further disclaim all right or title in or to any property, including fishing rights, the right or title to which may be held by or for any Indian, Eskimo, or Aleut, or community

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[4] It should be noted that Alaska was admitted to the Union under the so-called "Tennessee Plan." Under this Plan, the Territory by Convention prepared a Constitution and then petitioned Congress for admission. The alternative to the "Tennessee Plan" requires that Congress first pass an enabling act, setting forth the conditions of admission. Upon compliance by the proposed new state, Congress would then be asked to pass an admitting act. Until 1955, Alaska unsuccessfully sought enabling legislation from Congress. In 1956 Alaska adopted a Constitution for the proposed new State and proceeded thereafter, successfully, under the "Tennessee Plan" to secure admission.

> thereof, as that right or title is defined in the act of admission. The State and its people agree that, unless otherwise provided by Congress, the property, as described in this section, shall remain subject to the absolute disposition of the United States.

The meaning of the disclaimer language of Section 4 as it applies to appellant's fishing rights is plain. In that Section Congress confirmed Alaska's disclaimer of all interest in Indian fishing rights and reserved to the United States "absolute jurisdiction and control" over those rights. The clarity of the disclaimer language of Section 4 should make unnecessary any examination of the legislative history. *United States* v. *Missouri Pac. R. R.*, 278 U.S. 269, 277-78 (1928).

If the legislative history of a decade of Alaska Statehood bills is examined, however, it merely reinforces what is readily apparent in the language of Section 4: control over Indian fishing was to remain solely in the United States.

The first Alaska Statehood bill to be reported out of a Congressional Committee was H.R. 5666 of the 80th Congress. That bill embodied a proposal which had been submitted by the Department of the Interior, see *Hearings Before the Subcommittee on Territorial and Insular Possessions of the House Committee on Public Lands*, 80th Cong., 1st Sess. 14 (1947), setting the following requirement for the proposed Alaska Constitution:

> Said convention shall provide, by ordinance, irrevocable without the consent of the United States and the people of said State.
>
> . . .

> Second. That said State and its people do agree and declare that they forever disclaim all right and title to . . . all lands lying within its boundaries owned or held by any Indian, Aleut, or Eskimo, hereinafter called native, or by any native tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of the United States or of such native or native tribes shall have been disposed of or extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . .

It is to be noted that this early version of the disclaimer clause did not contain the parenthetical phrase "(including fishing rights)" now found in Section 4 of the Statehood Act. But even without the parenthetical phrase, the Committee's report made clear that Congress alone was to exercise control over appellant's fishing rights after statehood. The report stated:

> The basic intent of paragraph Second, Section 3, insofar as it deals with matters affecting the Indians, Aleuts, and Eskimos, is *to protect the natives of Alaska against the possibility of infringement of their property rights by the proposed new state, and to maintain unimpaired the authority of the Congress over the use and disposition of native property in Alaska.* Provisions to this effect are a customary feature of enabling acts admitting new States to the Union. As proposed to be amended this paragraph would preserve all existing valid native property rights in Alaska, including those derived from use or occupancy, together with all existing authority of the Congress to provide for the determination, perfection, or relinquishment of native property rights in Alaska. It would neither add to nor subtract from such rights and such authority, but would simply maintain the status quo.

> *Under the provisions of this paragraph,* with the recommended amendments, *none of the native groups,* as well as none of the native persons, *would lose any legal or equitable rights which they may now have to any lands or waters within Alaska.* This would be true irrespective of whether the group concerned holds a constitutional charter issued by the Federal Government or is organized in some other manner, and irrespective of whether the group is denominated a "village" or "community" or is called by some other name. In addition, all existing laws authorizing the establishment of reservations, or otherwise providing for the utilization by the natives of public lands or waters in Alaska would continue in effect until amended or repealed by the Congress. H.R. Rep. No. 1731, 80th Cong., 2d Sess. 31 (1948). (Emphasis added.)

H.R. 5666 failed of enactment. The Alaska Statehood drive was, however, resumed in the 81st Congress with the introduction of H.R. 331. Section 3, paragraph Second of the new Statehood Bill was identical to the language of that paragraph in H.R. 5666 of the 80th Congress. And the report of the House Committee on Public Lands, which quickly reported it out, was likewise identical to the language of the report in the previous Congress. See H.R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949). H.R. 331 passed the House on March 3, 1950, 96 Cong. Rec. 2744-81 (1950), and was subsequently referred to the Senate Committee on Interior and Insular Affairs.

It was during the Senate Interior Committee's consideration of Alaska Statehood in the 81st Congress that the phrase "(including fishing rights)" was added to the disclaimer clause. In describing the essentials

of the proposed State Constitution, the Committee noted:

> It is also provided that in the proposed constitution the new State and its people disclaim all right and title, not only to lands or other property of the United States, which is not conveyed or confirmed to the State or its political subdivisions, but also "to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives), or is held by the United States in trust for said natives."
>
> . . .
>
> The right of the Federal Government to legislate with respect to natives is not impaired by the bill and cannot be impaired by the State Constitution. S. Rep. No. 1929, 81st Cong., 2d Sess. 1-2 (1950).

Later in the same report the Committee left no doubt that it meant to withhold from Alaska any power over native fishing. The Committee stated:

> The new State would have the same control over the invaluable fisheries and wildlife within its borders as do other States of the Union, *subject only to the limitations of* international agreements, such as that affecting seals and *native rights to fish and wildlife. Id.* at 11. (Emphasis added.)

The Senate, however, failed to act on the bill.

Thus, by the close of the 81st Congress in 1950 the language of the disclaimer clause had crystallized in every detail important to this suit to the language later embodied in the Statehood Act. And, as the comments of the various Committees make clear, the thrust of the disclaimer was "to protect the natives of Alaska against the possibility of infringement of their prop-

erty rights by the proposed new State, and to maintain unimpaired the authority of Congress over the use and disposition of native property in Alaska." H. R. Rep. No. 255, 81st Cong., 1st Sess. 13 (1949).

In the 82d, 83d, and 84th Congresses, all of the Statehood bills which received serious consideration retained the disclaimer language—or substantially similar language—as ultimately became law as Section 4 of the Statehood Act. See 82d Cong.—S.50; 83d Cong.—S.50; H.R. 2982; 84th Cong.—H.R. 2535.

It was the 85th Congress which finally passed the Alaska Statehood Act. The disclaimer clause was now in Section 4. It was enacted into law in the same form in which it had been reported out of the House Committee on Interior and Insular Affairs. In commenting on the disclaimer, the House Committee stated:

> Section 4 provides that the State of Alaska and its people forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Admission Act, the right or title to which is held by the United States or is subject to disposition of the United States. This disclaimer likewise applies to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts, or is held by the United States in trust for them. The section also provides that except for property held by Indians, Aleuts or Eskimos in fee without restrictions on alienation, it would be under the jurisdiction and control of the United States . . . . H.R. Rep. No. 624, 85th Cong., 1st Sess. 19 (1957).

When the bill reached the Senate, a question was raised as to the rather sweeping language of Section 4, which provided that native lands and property shall remain "under the absolute jurisdiction and control of the United States." The Senate Committee on Interior and Insular Affairs pointed out that " 'absolute jurisdiction' is a term of art describing a status of authority which is not presently exercised by the United States over Indian lands within the United States." S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957). It proposed that Section 4 provide merely for the retention of "absolute control" by the United States. What the Committee evidently had in mind was that the United States does not have civil and criminal jurisdiction over non-Indians on Indian lands, hence its jurisdiction could not be "absolute." *United States* v. *McBratney,* 104 U.S. 621 (1882).[5] Of the basic objective of the Section, the Senate Committee strongly approved, pointing out that it was "to protect the rights of the native inhabitants." S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957).

This fine technical point of the Senate Committee was ultimately ignored. The Senate went on to enact

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[5] The statute under which Alaska acquired criminal jurisdiction over the Indian country, 18 U.S.C. § 1162(a), serves only to strengthen appellant's contention. Even apart from the limitations on the exercise of that jurisdiction contained in Article XII, Section 12 of the Alaska Constitution, the very words of Section 1162 forbid the type of action attempted by the State against appellant. Subsection (b) of Section 1162 states:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

the entire House bill, including its provision to retain "absolute jurisdiction and control" in the United States. This sweeping language most certainly encompasses the rights derived by the Metlakatla Indian Community from Section 15 of the Act of March 3, 1891.[6]

If there remained any doubt about the meaning of the State's disclaimer of jurisdiction over appellant's right to fish as embodied in Section 4, the Alaska Omnibus Act of 1959, 73 Stat. 141, laid those doubts to rest. The Omnibus Act, passed after Statehood was achieved, was an Administration measure "designed to eliminate some of the problems which exist in the transfer from the territorial status of Alaska to that of the 49th State." *Hearings before the Senate Committee on Interior and Insular Affairs,* 86th Cong., 1st Sess. 1 (1959). Section 2 of the Omnibus Act amended the language of Section 4 of the Statehood Act. The amendment is set forth in the Committee reports under "Changes in Existing Law" as follows:

> . . . that [all such lands or other property, belonging to the United States or which may belong to said natives] *all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives,* shall be and remain under the absolute jurisdiction and control of the United States . . . . S. Rep. No. 331,

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[6] The Department of Justice had suggested that Congress strike the parenthetical phrase "(including fishing rights)" from the bill, lest it be construed an admission that they are compensable rights. H.R. Rep. No. 624, 85th Cong., 1st Sess. 31 (1957); S. Rep. No. 1163, 85th Cong., 1st Sess. 47 (1957). Congress did not accept this suggestion.

86th Cong., 1st Sess. 30 (1959); H.R. Rep. No. 369, 86th Cong., 1st Sess. 38 (1959).

The Court's attention is directed to the fact that the parenthetical phrase "(including fishing rights)" was now inserted a second time in the disclaimer clause.

The amendment is best described in the transmittal letter of the Director of the Bureau of the Budget:

> Section 2 would amend section 4 of the Statehood Act. Section 4 now provides, in pertinent part, that Alaska and its people disclaim any right (a) to any lands in Alaska the right or title to which is now held by the United States, except for land granted to Alaska by the Statehood Act, and (b) to land and property held by Alaska natives or held in trust by the United States for such natives. The section further provides that "all such lands . . . shall be and remain under the absolute jurisdiction and control of the United States." It was intended that such absolute jurisdiction would apply to native lands only ((b) above), but the language actually enacted appears to comprehend the lands described in both (a) and (b). The amendment would make clear that "the absolute jurisdiction and control of the United States" does not apply generally to land held by the United States in Alaska, but only to land and property held by natives or by the United States in trust for natives.

The foregoing comment is reproduced verbatim as the comment of both the Senate and House Interior Committees. S. Rep. No. 331, 86th Cong., 1st Sess. 9 (1959); H.R. Rep. No. 369, 86th Cong., 1st Sess. 6 (1959).

As signed by the President on June 25, 1959, the amendment to Section 4 of the Statehood Act reemphasized that appellant's fishing rights were and were

to remain the special concern of the Federal Government and of the Federal Government alone.[7]

(2) *Section 4 of the Alaska Statehood Act is constitutional.*

Though appellant set forth the text of Section 4 of the Statehood Act in full in its complaint (R. 8) and relied heavily on it in its brief in the court below, the trial court failed to refer to that crucial section anywhere in its opinion. While sweeping Section 4 under the rug, the court declared with reference to the Metlakatla Reservation: "The federal government retained jurisdiction thereof until Alaska became a state but upon achieving statehood, dominion and sovereignty thereof passed to the new state, subject only to the authority of the federal government in regulating navigation and commerce." (R. 63.) For this proposition, the court relied on *Pollard* v. *Hagan,* 44 U.S. (3 How.) 212 (1845).

Pollard v. *Hagan* holds that a clause in a Statehood act which prevents a state from entering the Union on an "equal footing" with the other states is unconstitutional. Relying on this case the court below, in this indirect and rather clouded manner, ruled in effect that Section 4 of the Alaska Statehood Act is unconstitutional. As has already been shown, the effect of Section 4 with regard to the Metlakatla Indian Community is to preserve the rights established by the Act of

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[7] In the light of Section 4, of the Alaska Statehood Act, *Ward* v. *Race Horse,* 163 U.S. 504 (1896), and *New York* ex rel. *Kennedy* v. *Becker,* 241 U.S. 556 (1916), can have no bearing on this litigation. Besides, it has been suggested that the *Race Horse* case was repudiated by this Court in *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919). See *State* v. *Arthur,* 74 Ida. 251, 261 P.2d 135, 139 (1953), *cert. denied,* 347 U.S. 937 (1954).

March 3, 1891 without any change whatever. The question, therefore, is whether that result is violative of the Constitution of the United States.

The *Pollard* case decided, in its essence, that if a certain power may not be exercised constitutionally by the United States in one of the original States, it may not be exercised by the United States in a new State, even if provision is made in the Statehood Act or by compact that such power be reserved to the United States. As this Court phrased the principle:

> [I]f an express stipulation had been inserted in the agreement [to admit Alabama as a state], granting the municipal right of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because, the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, *except in the cases in which it is expressly granted. Id.* at 223. (Emphasis added.)

In *Coyle* v. *Smith,* 221 U.S. 559 (1911), this Court expounded further on this proposition :

> In considering the decisions of this court bearing upon the question, we must distinguish, first, between provisions which are fulfilled by the admission of the state; second, between compacts or affirmative legislation intended to operate *in futuro,* which are within the scope of the conceded powers of Congress over the subject; and third, compacts or affirmative legislation which operates to restrict the powers of such new state in respect of matters which would otherwise be exclusively within the sphere of state power. *Id.* at 568.

As an example of cases falling into the second class, the Court pointed out:

> [S]tipulations . . . in respect to the control of the United States of the large Indian reservations and Indian population of the new state, are found in the Oklahoma enabling acts. Whatever force such provisions have after the admission of the state may be attributed to the power of Congress over the subjects, derived from other provisions of the Constitution, rather than from any consent by or compact with the state. *Id.* at 570.

Thus the Federal power here asserted to exclude the State of Alaska from the regulation of Indian fishing within the Metlakatla Reservation must rest on a grant of authority in the Constitution of the United States. Such a grant of authority plainly exists. Article I, Section 8, Clause 3, of the Constitution of the United States recites:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes.

This Congressional power has been described as "[p]lenary," *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, at 565 (1903), and as "paramount and of a most sweeping character." *People* ex rel. *Ray* v. *Martin,* 294 N.Y. 61, 60 N.E.2d 541, 545 (1945), *aff'd,* 326 U.S. 496 (1946). It has been recognized as a limitation of the rights of states to apply their criminal laws in the Indian country in a long line of cases from *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), to *Williams* v. *Lee,* 358 U.S. 217 (1959). As this Court said in the latter case:

> [W]hen Congress has wished the States to exercise . . . power [over Indians] it has expressly granted

them the jurisdiction which *Worcester* v. *Georgia* had denied. *Id.* at 221.

The disclaimer provisions of Section 4 of the Alaska Statehood Act are by no means novel. They are patterned after similar provisions included in the Statehood Acts for States containing a substantial Indian population, admitted to the Union since 1889. Typical is the disclaimer provision in Section 4 of the Act admitting Montana, North Dakota, South Dakota and Washington, 25 Stat. 676, 677 (1889), which declares:

> And said [state constitutional] conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of the said States:
>
> . . .
>
> Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, *the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .* (Emphasis added.)

See also Statehood Acts for Utah, 28 Stat. 107, 108 (1894), Oklahoma, 34 Stat. 267, 270 (1906), New Mexico and Arizona, 36 Stat. 557, 558-59, 569-70 (1910).

The Arizona disclaimer provision was most recently referred to by this Court in *Williams* v. *Lee, supra,* 358 U.S. at 222, n.10 (1959). Other disclaimer provisions have been uniformly construed as excluding the

authority of the State from the area specified unless and until Congress authorizes the State to enter. See *e.g., Whyte* v. *District Court,* 346 P.2d 1012 (Colo. Sup. Ct. en banc, 1959); In re *Pine's Petition,* 99 N.W.2d 38 (S. Dak. 1959); *Application of Denetclaw,* 83 Ariz. 299, 320 P.2d 697 (1958); *State* v. *Begay,* 63 N.M. 409, 320 P.2d 1017 (1958).

In his opinion accompanying the granting of the stay, Mr. Justice Brennan spoke of "the long-standing policy of federal protection of Indian rights." 4 L. Ed. 2d at 38. As has been shown this policy has often required the exclusion of State jurisdiction from Indian reservation areas. Thus the exclusion of the States of Alaska from the regulation of fishing and the assertion of exclusive Federal authority is by no means novel; it has been traditionally upheld by the courts, including this Court, and is clearly authorized under the Indian Commerce Clause. It follows that Congress had the power to enact Section 4 of the Alaska Statehood Act.

C. The Rights Granted by the Act of March 3, 1891 and Preserved by Section 4 of the Alaska Statehood Act Have Not Been Repealed or Modified by Any Other Statute or Subsequent Legal Development

As has now been demonstrated, the right of appellant to fish subject only to Federal regulation was granted under the Act of March 3, 1891 and was preserved by Section 4 of the Alaska Statehood Act. Appellant submits that no other legal considerations are relevant to a determination of the issues in this case. However, as the court below has referred to certain other factors, it is appropriate to discuss them briefly.

To be sure, these other factors were not clearly articulated by the court below. Nevertheless, in examin-

ing its opinion, the following additional points can be identified: (1) the powers of the State of Alaska are enhanced by the Submerged Lands Act, 67 Stat. 30 (1953), 43 U.S.C. §§ 1311-15; (2) there is no property right in fish traps; (3) fish traps have depleted the salmon runs and have, therefore, been opposed by the people of Alaska. These points will now be discussed seriatim.

In its opinion the lower court declared:

> The new State of Alaska is entitled to such powers as have been given to all states by the Submerged Lands Act. (R. 62.)

Great emphasis was also placed on the Submerged Lands Act in appellees' brief below (Tr. 131, 137-38). Yet nowhere in the opinion or in appellees' brief has there been even an effort to explain how the Submerged Lands Act can have any application to this case in the light of Section 5(b) of that Act, 43 U.S.C. § 1313(b), which provides:

> There is excepted from the operation of section 1311 of this title—
>
> . . .
>
> (b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band or group of Indians or for individual Indians.

The statutory language could not be plainer nor state more concisely that excepted from the affirmative grant of the Submerged Lands Act were the Metlakatla Reservation waters surrounding the Annette Islands.

Nor has the contention that there is no property right in fish traps anything to do with this litigation. Ap-

pellant does not claim a property right in any particular gear. *Cf. Klamath & Modoc Tribes* v. *Maison,* 139 F. Supp. 634 (D. Ore. 1956). It claims an exclusive right to fish, subject to Federal regulation, *but free from regulation by the State of Alaska.* If the State could regulate the fishing gear, it could also regulate the length of the season, and could, in fact, shut down the Metlakatla fishery entirely. See *State* v. *Arthur,* 74 Ida. 251, 261 P. 2d 135 (1953), *cert. denied,* 347 U.S. 937 (1954). That is exactly what Section 4 of the Alaska Statehood Act was designed to prevent.

Similarly, the trial court's seven findings of fact (R. 60-61) have no bearing on this case. They are concerned with policy considerations which are the affairs of Congress, not the judiciary. However, as the trial court has referred to these policy problems, and as appellant is here seeking relief in equity, it would be appropriate to set the record straight.

The fact is that the fish traps here in issue have no appreciable impact on the fish economy of the State of Alaska, as can be seen from the following tabulation:

Year	Alaska Salmon Pack[1] Total	Metlakatla Trap Caught[2] Salmon Pack	Percent (%)
	(Standard 48-pound cases)		
1952	3,574,128	19,327	.54
1953	2,925,570	10,051	.34
1954	3,207,154	22,390	.7
1955	2,457,969	5,793	.23
1956	2,950,354	13,845	.47
1957	2,441,894	8,308	.34
1958	2,984,371	25,763	.8

[1] Pacific Fisherman Yearbook, p. 94 (Jan. 25, 1959).
[2] R. 33.

It should also be noted that the Secretary of the Interior has nonetheless taken account of the seasonal fluctuations in salmon runs in safeguarding the broad public interest in sound conservation practices in Alaska. Of the 21 trap sites authorized for appellant Metlakatla, and for appellants in No. 327, Kake and Angoon,[8] the Secretary has in the past five years permitted operations of traps only as follows:[9]

Year	Metlakatla	Kake	Angoon	Total
1954	4	3	2	9
1955	3	3	2	8
1956	4	3	2	9
1957	3	3	2	8
1958	4	4	3	11
1959	4	4	3	11

It is not conservation that is here at issue. If anything, fishing by traps, which tends to result in fewer damaged fish than fishing with other gear, is preferable from a conservation point of view.[10] The true reason for the effort to suppress the fish traps is that it is a relatively inexpensive method of fishing. Through the use of fish traps, the Metlakatla Indian Community

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[8] Metlakatla has 8 authorized trap sites; Kake has 9; and Angoon has 4. 24 Fed. Reg. 2054 (1959).

[9] See Appendix A, *infra*, at 49.

[10] Report of Secretary of the Interior Douglas McKay on H.R. 242, 84th Cong., dated Oct. 7, 1955, Appendix B, *infra* at 50.

> Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support of this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.

has indeed been able to prosper. Profits of the cannery have been expended on community improvement projects, which have made the Annette Islands a self-supporting community in the new State.[11] Surely, the State will not gain from this effort to remove the economic underpinning of this Indian community. And the Federal Government has a rightful concern to prevent such unwise action by the State, has the power to prevent it, and has most certainly exercised that power.

CONCLUSION

For the reasons set forth herein, this Court should note jurisdiction and reverse the judgment below.

Respectfully submitted,

RICHARD SCHIFTER
THEODORE H. LITTLE

Of Counsel: *Attorneys for Appellant*

DANIEL M. SINGER
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Frank & Kampelman

Dated: April 11, 960.

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[11] *Village of Kake* v. *Egan*, 4 L.Ed.2d 34, at 35 (per Mr. Justice Brennan, Circuit Justice):

> The Indian members of this reservation with the financial support of the Federal Government have been engaged in trapping and canning operations since 1915, and such activity provides the only means of support for substantially all of the inhabitants of the reservation. The Metlakatla Indian Community is obligated to make specific payments to the United States each year in repayment for facilities and equipment bought for its use by the Government. It relies on earnings from its fishing and canning operations to make these payments.

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF COMMERCIAL FISHERIES
WASHINGTON 25, D. C.

April 6, 1960

Mr. Daniel M. Singer
1700 K Street, Northwest
Washington 6, D. C.

Dear Mr. Singer:

This is in response to your request by telephone on April 5 for information concerning traps operated by native communities in Alaska. The number of traps operated by each of the three native groups were as follows for the years 1954 to 1959:

	1954	1955	1956	1957	1958	1959
Kake	3	3	3	3	4	4
Angoon	2	2	2	2	3	3
Annette Island	4	3	4	3	4	4
TOTAL	9	8	9	8	11	11

Sincerely yours,

JOHN I. HODGES
John I. Hodges, *Chief*
Branch of Resource Management

APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON 25, D. C.

Copy October 7, 1955

My dear Mr. Bonner:

Your Committee has requested a report on H. R. 242, a bill "To provide for the gradual elimination of Salmon traps in the waters of Alaska."

* * * * * * * * *

For many years traps have been one of the chief methods of catching salmon in Alaskan waters. In recent years the proportion of the Alaska salmon catch taken with traps has been declining, largely because of the closing, through regulatory action or voluntary agreement, of some of the trap sites in order to permit a larger escapement.

Various arguments have been urged in favor of eliminating the traps, not all of which have equal validity. For example, it is sometimes argued that the traps should be abolished as a conservation measure. Years of experience give no support to this argument. The basic conservation problem is one of permitting escapement of sufficient salmon to maintain the runs in succeeding years. That can be done as easily through regulating the traps as through regulating other types of gear.

It is the economic arguments in favor of abolishing the traps which are decisive. Traps are a form of fishing equipment which require capital outlays beyond the capacity of most individual fishermen to finance. Salmon are also caught in Alaska with purse seines, beach seines, gill nets, troll lines, and other types of gear. These are commonly owned by individual fishermen conducting small-scale operations.

A shift in the industry from trap fishing to fishing with less expensive types of gear may therefore be expected to strengthen the competitive position of the individual fisherman or small-scale operator. With a limited resource to develop, it seems right that opportunities to participate in it should be distributed as widely as possible.

* * * * * * * * *

Sincerely yours,

s/ DOUGLAS MCKAY
Secretary of the Interior

Hon. Herbert C. Bonner
Chairman, Committee on
Merchant Marine and Fisheries
House of Representatives
Washington 25, D. C.

APPENDIX C

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON

[25 CFR Part 88]

INDIAN FISHING REGULATIONS IN ALASKA

Notice is hereby given that pursuant to the obligation imposed upon, and the authority vested in, the Secretary of the Interior by Section 2 and 9 of Title 25, and Section 485 of Title 5, U.S. Code, and Section 4 of the Act of July 7, 1958, 72 Stat. 339 amended, 73 Stat. 141, it is proposed to amend 25 CFR by adding a new part 88 as set forth below. The purpose of these amendments is to protect certain fishing rights which have long been recognized; which derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., other

Federal statutes, regulations and custom; and which were secured to the Alaska Eskimos, Indians and Aleuts by Section 4 of the Alaska Statehood Act of July 7, 1958.

It is the policy of the Department of the Interior whenever practicable, to afford the public an opportunity to participate in the rule making process. Accordingly, interested persons may submit written comments, suggestions or objections with respect to the proposed amendments, to the Commissioner, Bureau of Indian Affairs, Washington 25, D. C., within 30 days after the date of publication of this notice in the Federal Register.

Part 88, reading as follows, is added to 25 CFR, Subchapter H:

§ 88.1 *Scope.* These regulations implement section 4 of the Act of July 7, 1958, 72 Stat. 339, as amended, by declaring existing fishing rights of Indians in Alaska and providing for the protection and control thereof. Provisions for those rights derive from the Act of June 6, 1924, as amended, 48 U.S.C. 221 et seq., and the limitations and sanctions necessary to preserve such rights are included herein. These regulations are permissive, but shall not be construed as a limitation upon any native rights not mentioned in this part.

§ 88.2 *Restrictions on Native Indian traps.*

(a) Not more than the 21 salmon fish-trap sites heretofore recognized as Indian salmon fish-trap locations as hereinafter described may be utilized for the purpose of salmon trap fishing by Indian villages, within the following described waters at the sites described. Subject to the limitations of paragraph (e) of this section, traps owned and operated by the native villages may be operated at any time within a described area when salmon net fishing is permitted in any part of such area, or adjacent districts, by the State of Alaska:

* * * * * * * * *

Metlakatla Indian Community
(Annette Island Fishery Reserve)

(d) All waters within a line from the international boundary at 131° west longitude to Mary Island light, Hog Rocks light, Bold Island light, Race Point, thence to the southern extremity of Vallenar Point, thence to Point Higgins, thence to Caamano Point, thence down the middle of Clarence Strait to the international boundary:

(1) Annette Island at 55° 15′ 09″ north latitude, 131° 36′ 10″ west longitude.

(2) Annette Island at 55° 12′ 52″ north latitude, 131° 36′ 10″ west longitude.

(3) Annette Island at 55° 02′ 47″ north latitude, 131° 38′ 53″ west longitude.

(4) Annette Island at 55° 05′ 41″ north latitude, 131° 36′ 39″ west longitude.

(5) Annette Island at 55° 01′ 54″ north latitude, 131° 38′ 36″ west longitude.

(6) Annette Island at 55° 00′ 45″ north latitude, 131° 38′ 30″ west longitude.

(7) Annette Island at 54° 59′ 41″ north latitude, 131° 36′ 48″ west longitude.

(8) Ham Island at 55° 10′ 13″ north latitude, 131° 19′ 31″ west longitude.

(e) During the 1960 fishing season and until the Secretary or his authorized representative determines otherwise, the villages may operate traps only at the following sites: Angoon: (1) (2) and (4); Kake: (3) (4) (8) and (9); Metlakatla: (2) (3) (4) and (6).

§ 88.3 *Size and operation of Indian salmon traps.*

(a) No trap shall extend more than 900 feet from shore to the outer face of the pot as measured at mean high tide when any part is in a greater depth of water than 100 feet.

(b) Poles shall be permanently secured to the webbing at each side of the mouth of the pot tunnel and shall extend from the tunnel floor to a height of at least 4 feet above the water. A draw line shall be reeved through the lower end of both poles and the top of one. During any period when commercial net fishing for salmon is prohibited by the State of Alaska in the waters open to trap fishing as above described, the tunnel walls shall be overlapped as far as possible, the line pulled tight and both secured so as to close the trap to fishing. In addition 25 feet of the webbing of the heart on each side next to the pot shall be lifted or lowered in such manner as to permit the free passage of salmon and other fish.

* * * * * * * * *

§ 88.8 *Modification of regulations.*

The regulations in this part will be modified from time to time as the Secretary of the Interior may deem necessary. The native Indians and Indian villages of Alaska shall be governed by these regulations in the waters where they apply or by the regulations of the State of Alaska, whichever are least restrictive to their fishing operations.

§ 88.9 *Enforcement.* Fishing activities in violation of these regulations will be subject to the sanctions imposed by the Act of June 6, 1924, as amended, 48 U.S.C. 226.

s/ FRED A. SEATON
Secretary of the Interior

April 6, 1960